



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC PETITION NO. 16 OF 2016**

**IN THE MATTER OF PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONER**

**AND**

**UNDER ARTICLES 19, 20, 23, 24, 27, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE PROVISIONS OF SECTIONS 17, 25 AND 27 OF THE LAND CONSOLIDATION ACT (CAP 253) OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ACTIONS OF THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER MERU CENTRAL IN ARBITRARILY ORDERING THAT NEW LAND REFERENCE NUMBERS BE INTERRED IN THE REGISTER TO NEW PERSONS AGAINST PETITIONERS' LAND PARCELS BE DEMARCATED AND RECORD FOR STRANGERS WHO ARE JUST TRESPASSERS TO THE PETITIONERS' LAND**

**BETWEEN**

JACOB NAKUNYU.....1<sup>ST</sup> PETITIONER

ELIAS MIKWA.....2<sup>ND</sup> PETITIONER

GEOFFREY MUTHUKU.....3<sup>RD</sup> PETITIONER

SILAS GITUMA.....4<sup>TH</sup> PETITIONER

JOSHUA GUANTAL.....5<sup>TH</sup> PETITIONER

LUCY NCORORO.....6<sup>TH</sup> PETITIONER

JULIUS MURIUKI.....7<sup>TH</sup> PETITIONER

CHARLES MURIANKI.....8<sup>TH</sup> PETITIONER

JULIUS KORONYO.....9<sup>TH</sup> PETITIONER

WILLIAM MUGAMBI.....10<sup>TH</sup> PETITIONER

NYOROKA MARETE.....	11 <sup>TH</sup> PETITIONER
STANLEY MWONGERA.....	12 <sup>TH</sup> PETITIONER
GRACE NTINYARI MBERIA.....	13 <sup>TH</sup> PETITIONER
SOLOMON MBURUGU.....	14 <sup>TH</sup> PETITIONER
ISAIAH KOOME.....	15 <sup>TH</sup> PETITIONER
HERNY KATHURIMA.....	16 <sup>TH</sup> PETITIONER
JEREMIAH KIAMBATI.....	17 <sup>TH</sup> PETITIONER
GEOFFREY KIRIMI ITAANIA.....	18 <sup>TH</sup> PETITIONER
M'IRING'O M'TURUCHIU.....	19 <sup>TH</sup> PETITIONER
GEORGE MURIITHI.....	20 <sup>TH</sup> PETITIONER
MERCY MBAJO.....	21 <sup>ST</sup> PETITIONER
ERASTUS KATHURIMA.....	22 <sup>ND</sup> PETITIONER
PETER KITHINJI .....	23 <sup>RD</sup> PETITIONER
M'IMANYARA M'MWONGO.....	24 <sup>TH</sup> PETITIONER
MOSES KARUNTIMI .....	25 <sup>TH</sup> PETITIONER
STEPHEN KOOME MUSA.....	26 <sup>TH</sup> PETITIONER
ELIZABETH KAROKI .....	27 <sup>TH</sup> PETITIONER
JAMES KIANDA .....	28 <sup>TH</sup> PETITIONER
FREDRICK KIBITI.....	29 <sup>TH</sup> PETITIONER
JENARO M'NDEGWA ARIMBI.....	30 <sup>TH</sup> PETITIONER
CHARLES MURIUKI.....	31 <sup>ST</sup> PETITIONER
FREDRICK THUNGUTHA.....	32 <sup>ND</sup> PETITIONER
JEDIEL MUKARIA .....	33 <sup>RD</sup> PETITIONER
EDWARD KIRIMI MURONG'A.....	34 <sup>TH</sup> PETITIONER
MATHIU KATHAKENE.....	35 <sup>TH</sup> PETITIONER
STEPHEN KIRIMA .....	36 <sup>TH</sup> PETITIONER
ISRAEL MUGAMBI .....	37 <sup>TH</sup> PETITIONER
ESTHER KARURU M'MWITHIMBU.....	38 <sup>TH</sup> PETITIONER
DANIEL KANG'ORIA RIKURU.....	39 <sup>TH</sup> PETITIONER
DAVID KIOGORA .....	40 <sup>TH</sup> PETITIONER

JUDITH KIAMBI .....	41 <sup>ST</sup> PETITIONER
JULIUS MUTWIRI .....	42 <sup>ND</sup> PETITIONER
LAWRENCE MUTGWA NTURIBI .....	43 <sup>RD</sup> PETITIONER
JOHN MURIUKI .....	44 <sup>TH</sup> PETITIONER
JENIFFER NGOKI.....	45 <sup>TH</sup> PETITIONER
JENIFFER KATHURE.....	46 <sup>TH</sup> PETITIONER
SOLOMON MURITHI .....	47 <sup>TH</sup> PETITIONER
BETH MUTEMBEI .....	48 <sup>TH</sup> PETITIONER
AGNES MPAKA MBAYA .....	49 <sup>TH</sup> PETITIONER
NANCY GAKII .....	50 <sup>TH</sup> PETITIONER
STEPHEN MURIIRA MANYARA.....	51 <sup>ST</sup> PETITIONER
STEPHEN KATHURIMA.....	52 <sup>ND</sup> PETITIONER
ROY MARETE .....	53 <sup>RD</sup> PETITIONER
BENEDICT KIATHE .....	54 <sup>TH</sup> PETITIONER
JULIUS KARUKI M'MBOROKI .....	55 <sup>TH</sup> PETITIONER
SILAS KIMATHI MWIRICHIA .....	56 <sup>TH</sup> PETITIONER
JAPHET MWENDA MARANGU.....	57 <sup>TH</sup> PETITIONER
ESTHER NJERI M'MBIJIWE.....	58 <sup>TH</sup> PETITIONER
ISAACK KAAI M'INANGA.....	59 <sup>TH</sup> PETITIONER
KAMUNDI KAWIRA.....	60 <sup>TH</sup> PETITIONER
TARCISIO MAINGI MURUNGI.....	61 <sup>ST</sup> PETITIONER
JOHN GIKUNDA M'RUKARIA.....	62 <sup>ND</sup> PETITIONER
TABITHA WAIRIMU MWANGI .....	63 <sup>RD</sup> PETITIONER
JACKSON KINARA .....	64 <sup>TH</sup> PETITIONER
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ALICE KARAMANA .....	68 <sup>TH</sup> PETITIONER
BERTHER KARWITHA .....	69 <sup>TH</sup> PETITIONER
JAMES KIMATHI .....	70 <sup>TH</sup> PETITIONER

DIBORAH GACHERI.....	71 <sup>ST</sup> PETITIONER
JESKA KAGWIRIA .....	72 <sup>ND</sup> PETITIONER
MARTIN NDEREBA 73 <sup>RD</sup> .....	PETITIONER
FLORENCE MAKENA NTARA.....	74 <sup>TH</sup> PETITIONER
SELLA KAGENDO KABUTU.....	75 <sup>TH</sup> PETITIONER
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CARLORINE MUNTHEA .....	77 <sup>TH</sup> PETITIONER
JOHN KOBIA.....	78 <sup>TH</sup> PETITIONER
MOSES MURIIRA M'TUAERANDO.....	79 <sup>TH</sup> PETITIONER
JENIFFER MBURIA M'MATIRI.....	80 <sup>TH</sup> PETITIONER
M'ANAMPIU M'MAKINYA MUTUGA.....	81 <sup>ST</sup> PETITIONER
GEORGE KARANI M'RIMBERIA.....	82 <sup>ND</sup> PETITIONER
JULIUS KIREMA.....	83 <sup>RD</sup> PETITIONER
FRANKLINE BUNDI.....	84 <sup>TH</sup> PETITIONER
GOERGE M'MARETE.....	85 <sup>TH</sup> PETITIONER
AGNES KALONDU.....	86 <sup>TH</sup> PETITIONER
ROBERT KATHURIMA.....	87 <sup>TH</sup> PETITIONER
MOSES RIUNGU.....	88 <sup>TH</sup> PETITIONER
NICHOAS GITONGA.....	89 <sup>TH</sup> PETITIONER
JANE KATHURE.....	90 <sup>TH</sup> PETITIONER
CHARLES MWENDA.....	91 <sup>ST</sup> PETITIONER
JOHN KIRAGU M'RITHARA.....	92 <sup>ND</sup> D PETITIONER
JOHN MURITHI.....	93 <sup>RD</sup> PETITIONER
ANNE KAJUJU MATHEWS.....	94 <sup>TH</sup> PETITIONER
CHARLES MUTUGWA.....	95 <sup>TH</sup> PETITIONER
EVANGELINE NKIROTE M'ANAMPIU.....	96 <sup>TH</sup> PETITIONER
JOSEPH KABURUNGA.....	97 <sup>TH</sup> PETITIONER
MARGARET NKIROTE KAIMENYI.....	98 <sup>TH</sup> PETITIONER
MILLIAM KAIRUTHI.....	99 <sup>TH</sup> PETITIONER
SAMUEL GITHINJI.....	100 <sup>TH</sup> PETITIONER

STEPHEN MURUNGI.....	101 <sup>ST</sup> PETITIONER
GEDIEL MURERWA.....	102 <sup>ND</sup> PETITIONER
CHARLES MUTWIRI.....	103 <sup>RD</sup> PETITIONER
STEPHEN INKUNYUA.....	104 <sup>TH</sup> PETITIONER
DAVID IKUNYUA.....	105 <sup>TH</sup> PETITIONER
CHARLES KIMATHI.....	106 <sup>TH</sup> PETITIONER
PAUL NKUNJA.....	107 <sup>TH</sup> PETITIONER
MARTIN LOBO.....	108 <sup>TH</sup> PETITIONER
JACOB KIRARI.....	109 <sup>TH</sup> PETITIONER
JUSTUS KIAMBATI MATHIU.....	110 <sup>TH</sup> PETITIONER
BONFACE KITHINJI.....	111 <sup>TH</sup> PETITIONER
MARGARET KARURO.....	112 <sup>TH</sup> PETITIONER
DAVID MWIGIRI.....	113 <sup>TH</sup> PETITIONER
DORCAS MUCECE.....	114 <sup>TH</sup> PETITIONER
PURITY KIENDI.....	115 <sup>TH</sup> PETITIONER
BEANRD MUTHURI.....	116 <sup>TH</sup> PETITIONER
GILBERT KIREMA.....	117 <sup>TH</sup> PETITIONER
GRIGORY MWENDA.....	118 <sup>TH</sup> PETITIONER
JOSLLINE KATHURE.....	119 <sup>TH</sup> PETITIONER
EVANGELINE MUNDU.....	120 <sup>TH</sup> PETITIONER
MARGARET NJIRU.....	121 <sup>ST</sup> PETITIONER
JACOB IRINGO MATHIU.....	122 <sup>ND</sup> PETITIONER

AND

DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER IMENTI CENTRAL DISTRICT.....	1 <sup>ST</sup> RESPONDENT
ATTORNEY GENERAL.....	2 <sup>ND</sup> RESPONDENT

GEDION MUCHUI ARITHI

JEREMIAH MUTHEE THAIMUTA

CHARLES KABERIA LINTARI

JOSEPH MBAABU NDUNGU

DR. THIAKUNU MWIRABUA & 1832 others.....1<sup>ST</sup> INTERESTED PARTY

COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> INTERESTED PARTY

## JUDGMENT

### **A. THE PETITION**

1. The petition before the court is one dated 27.6.2016. The petitioners state they are the registered owners of Parcel known as **Mbwaa 'A'** which was secretly and mischievously hived from **Ruiri/Rwarera Adjudication Section** in Meru County hereinafter the suitland.
2. On or about 1983 the petitioners who are of the Imenti Sub-tribe of Ameru community aver they were in actual possession, use and had made substantial developments in the suit land.
3. That the land was invaded and they were evicted by strangers namely the Tigania subtribe of Ameru community, who proceeded to be allocated parcels numbers by the respondents.
4. That towards 2013, the 1<sup>st</sup> respondent arbitrarily made an administrative decision declaring the area known as **Mbwaa 'A'** as an adjudication section falling outside **Ruiri/Rwarea adjudication section** and made it an independent adjudication section.
5. The petitioners aver the aforesaid decision was arbitrary, illegal, unprocedural, unreasonable, against rules of natural justice and in flagrant disregard of the rule of law.
6. Further the petitioners aver they were not consulted before the decision was made; they ought to have been notified and or involved; it amounted to denial of the people of Imenti subtribe of their land and handing it over to the Tigania people; it was contrary and in breach of the national values and principles as to public participation, transparency and accountability; and lastly it was in breach of an established boundary between the two districts of Meru Central and Meru North.
7. Further the petitioners aver they had settled in the suit land but were illegally displaced and or evicted from the said land and are now living elsewhere as internally displaced persons and that the process to secretly and fraudulently hive out the Mbwaa 'A' adjudication section from Ruiri/Rwarea was intended to defeat justice and deny them their proprietary rights.
8. Additionally, the petitioners aver the respondents in complete breach of their constitutional rights and freedoms are issuing new parcel numbers to persons who forcefully evicted them from the suit land, hence making them suffer irreparable damage.
9. The petitioners pray for:-
  1. **Conservatory order that their constitutional rights to own property in Mbwaa 'A' adjudication section pursuant to Article 40 of the Constitution have been grossly denied, threatened and breached.**
  2. **Declaration that the petitioners are legal owners of parcels of land in Mbwaa 'A' adjudication section.**
  3. **An order of judicial review in terms of certiorari to quash the administrative decision by the respondents to hive out Mbwaa 'A' adjudication section from Ruiri Rwarera Adjudication Section.**
  4. **An order of permanent injunction against the respondents, their agents, representatives, servants and any one claiming through them from issuing new land numbers in respect of parcels of land in Mbwaa 'A'. Adjudication Section.**
  5. **Any other order the court deems fit for the ends of justice to be met.**
  6. **Costs and interests.**
10. The petition is supported by a verifying affidavit of Jacob Makunyu sworn on **27.6.2016** on behalf of the petitioners and witnesses statements filed on 4.2.2019.
11. The petitioners alongside the petition filed a notice of motion dated 27.6.2016 seeking for temporally orders of injunction supported by an affidavit sworn by Jacob Makunyu on even date. In the supporting affidavit, the deponent attached an authority from the petitioners to sign and execute all the relevant documents and court processes herein. He also attached annexures marked **JM 2 (1- XXXII)** being copies of confirmation of ownership and receipts for suit land.
12. Whereas the petitioners' allege breach of constitutional rights and freedoms in the witness statement dated 4.2.2019, the 1<sup>st</sup> petitioner appears to be saying the 1<sup>st</sup> respondent went against the letter and spirit of the consent order from the Court of Appeal.
  13. It is pleaded clauses **6 (i), 6 (iii) and 6 (iv)** of the consent order connoted that all the people settled on the land inclusive of the petitioners should have had their land adjudicated but instead the 1<sup>st</sup> respondent only declared the section a new one and named it as **Mbwaa 'A' adjudication section** which was a politically deliberate scheme by the 1<sup>st</sup> respondent working in cohorts with

several politicians to take away land legally owned by the Imenti people and wholly give the same to Tigania people.

14. As regards the witness statement of **Isreal Mugambi**, he states:

*“That it is true that after the adjudication register was opened for objection, we retained our parcels and were awaiting for the titles to be given when an unlawful name was given to part the same Ruiru/Rwarera adjudication section and named Mbwaa 1 all with the sole intention of giving the said parcels to the people of Tigania”.*

## **B. THE RESPONSES**

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents**

15. Upon service with the petition and the application, the 1<sup>st</sup> respondent entered appearance and filed a replying affidavit sworn by **Ali H. Chemasuet** on 4.11.2016. He averred that in 2003, Tigania West residents went to court after their parcels in Ruiru Rwarera adjudication section were illegally occupied. In **High Court Misc. Civil Application No. 344 of 2003** the court declared the Ruiru Rwarera adjudication section null and void; leading to an appeal by **Alfred Mworira and 110 others** namely **Nairobi Civil Appeal No. 129 of 2005** at the Court of Appeal.

16. It was averred a consent order was entered between the parties to the appeal for a new adjudication section to be declared separate but the old Ruiru Rwarera adjudication section with clearly defined areas.

17. The 1<sup>st</sup> respondent avers a new adjudication section by the name Mbwaa was established under **Section 5 of the Land Adjudication Act** on 13.2.2016 and announced in a public baraza at Mugae Commercial Centre in the presence of both the County and National Government officials led by the Governor of Meru as a follow-up to the consent order from the Court of Appeal.

18. Further it was averred the whole of Mbwaa I adjudication section falls under Tigania West district and three quarter of the land in Ruiru Rwarera once belonged to Tigania West District formerly Meru North District that committee members were by consent elected and adjudication process got underway and that by the time the petitioners herein obtained a stop order on 20.7.2016, the work was almost complete.

19. Additionally the 1<sup>st</sup> respondent disputed the petitioners annexures marked **JM 1 – XXXIV** since the said parcel numbers were set aside by the Court of Appeal consent order, and had the petitioners allowed the process to continue, they would have individually presented their claims to the 1<sup>st</sup> respondent who would if not satisfied with its decision given them a consent to proceed to court for redress instead of stopping the whole exercise in total disregard to the interests of the other land owners in the adjudication section.

20. Following request, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties were enjoined as parties in these proceedings.

## **C. CASE BY THE INTERESTED PARTIES**

21. The 1<sup>st</sup> – 1832<sup>nd</sup> interested parties through an affidavit sworn by **Gedion Muchui Arithi** on **21.10.2021**, opposed the petition on the basis that the execution of the **Mbwaa ‘A’ adjudication section** was lawful and the exercise was undertaken as per the **Land Adjudication Act**.

22. As a starting, the 1<sup>st</sup> – 1832<sup>nd</sup> interested party stated the 1<sup>st</sup> respondent should be Tigania West Sub-County Land Adjudication & Settlement Officer since Mbwaa ‘A’ adjudication section falls under Tigania West Constituency in Tigania West sub-County.

23. Secondly they stated the adjudication section was validly and openly established in line with the Court of Appeal consent order hence it was misleading for the petitioners to allege mischief.

24. Thirdly, it was averred ascribing a name Mbwaa ‘A’ was both a statutory and an administrative function for the efficient management of the adjudication process hence there is no prejudice occasioned.

25. Fourthly, it was averred Mbwaa adjudication section covered the entire of Rei sub-location and Mumui Sub-location of Mumui location in Tigania Sub-county which is occupied by over 2,100 families among them the interested parties.

26. Fifthly, it was stated there were multiple suits instituted before the court over the same subject matter or adjudication section halting the entire adjudication process.

27. Sixthly, it was stated that the District Land Adjudication & Settlement officer commenced the process in compliance with the consent order and the **Land Adjudication Act Cap 284** hence the petition is premature, it is contrary to the doctrine of ripeness and if the process is allowed to proceed the petitioners shall have opportunities if aggrieved along the way to raise any claims along the internal dispute mechanisms set out under the **Land Adjudication Act**.

28. Additionally the 1<sup>st</sup> – 1832<sup>nd</sup> interested parties stated the petition was filed without a requisite consent to sue, in bad faith, with the intention of derailing the adjudication process and it infringed the rights of other land owners in the area including the interested parties.

29. Lastly in paragraph 23 of the replying affidavit, the 1<sup>st</sup> – 1832<sup>nd</sup> parties urged the court to reject the petition, allow the process to continue in line with the law and in the alternative if the court finds the petition with merits in the interest of justice the adjudication section be conducted afresh by the 1<sup>st</sup> respondent in line with **Cap 284**.

30. Regarding the 1934 interested party, the County Government of Meru, they opposed the petition through a replying affidavit by Mr. Jeremiah Lenya sworn on 25.10.2021.

31. The County Government of Meru aver under Article 174 of the **Constitution**, one of the objectives of devolution was to recognize the rights of the community to manage their own affairs and to further their development.

32. Further it was stated demarcation of an undemarcated land within the County of Meru and eventual issuance of title deeds would spur economic development while at the same time securing the proprietary interests and tenure in land rights to the citizens, hence the reason there existed **Cap 284**.

33. In its view the County Government of Meru maintained the 1<sup>st</sup> respondent followed the law and the consent from the Court of Appeal which had never been varied, set aside or vacated.

34. Lastly the County Government of Meru insisted the petitioners had brought no evidence that Mbwaa adjudication section was superimposed upon the former Ruiru Rwarera adjudication section and or there was juxta position of the aforesaid two sections.

#### **D. SUBMISSIONS**

35. The petitioners vide submissions filed on 5.11.2021 aver that the petition is as a result of the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents whereby they super-imposed an adjudication section Mbwaa 'A' over an already existing adjudication section namely Ruiru Rwarera which had been in existence for several years; the adjudication process was halted by **High court Misc. Application (Jr) 344/2003** that culminated in the **Court of Appeal No. 129/2005**; petitioners owned, lived on parcels within the Ruiru/Rwarera adjudication section. The 1<sup>st</sup> and 2<sup>nd</sup> respondents unilaterally and without any consultations hived off part of Ruiru/Rwarera adjudication section and declared a new adjudication section.

36. The petitioners further submit they were condemned unheard; the process was null and void **abinitio** and no public participation was held thus they rely on **Robert N. Gakuru & Others –vs- Kiambu County Government & 3 Others [2014] eKLR**, **Article 10** of the **Constitution** on national values and principles of governance.

37. Further the petitioners submit the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted unlawfully to hive off/rename and or commence the adjudication process yet the petitioners had a legitimate expectation to be registered as owners under **Article 40** of the **Constitution**. The petitioners rely **E&L Petition No. 4 of 2016 Sirikwa Squatters –vs- Commissioner for lands & 9 Others** and **Petition 7 of 2017 County Government of Meru & Another –vs- The District Land Adjudication & Settlement Officer Tigania East Sub-County and Others**.

38. In the submissions filed on 26.11.2021, the respondents interested parties submitted on two issues: that the petition was pre-mature because of the existence of alternative statutory remedies under Cap 284; secondly that the petitioners did not merit an equitable remedy of an injunction.

39. On the other hand the 1<sup>st</sup> – 1832<sup>nd</sup> interested parties submit that the petition was stillborn since there existed a mechanism to resolve disputes that arise from an adjudication process under **Sections 26 and 29** of **Cap 284**. They cited the **Speaker of the National Assembly – vs- James Njenga Karumu [1992] eKLR**, **Mike Makarena –vs- District Land Adjudication & Settlement Officer Tigania East & 3 Others [2020] eKLR**, **Dickson Mukwe Lukeine (petitioning on his own behalf and on behalf of the residents of Olderkesi Adjudication Section) – vs- Attorney General & 4 Others [2012] eKLR** and submit that the petitioners had not demonstrated any reason for disregarding the statute by which all legitimate claimants to land in Mbwaa 'A' adjudication section are required to follow.

40. The 1<sup>st</sup> – 1832<sup>nd</sup> interested parties submit that the Mbwaa community was duly notified of the adjudication process and that there was public participation through announcements in barazas, markets and the churches.

41. It was further submitted that the respondents' actions on Mbwaa adjudication section emanated from the consent dated 24.9.2014 which was adopted as a court order in the Court of Appeal in **Civil Appeal No. 129 of 2005**. Thus the respondents acted in compliance with the said order and not **suo moto** as alleged by the petitioners.

42. The 1<sup>st</sup> – 1832<sup>nd</sup> interested parties further submit that legitimate expectation must be both lawful and provable, not just a mere word; since the Mbwaa 'A' adjudication section was a creature of the Court of Appeal consent order.

43. It was also submitted that the petition was filed **mala fide**, was devoid of merit, was a blatant abuse of the court process and that the 1<sup>st</sup> respondent should be left to complete the remaining bit on the adjudication of Mbwaa 'A' adjudication section.

44. In submissions dated 25.11.2021, the County Government of Meru, the 1834 interested party submitted the petition was geared towards scuttling the adjudication process over Mbwaa 'A' adjudication section; that the petitioners had not adduced any expert drawings to show the original Ruiru/Rwarera adjudication section and further how Mbwaa 'A' was hived off; further they had not proved through affidavits the specific articles of the Constitution contravened by the respondents and lastly the petition did not meet the threshold of a constitutional petition as laid down in **Grayo Gepkemoi Kiplagat –vs- Zakayo Chepkonga Cheruiyot [1979] eKLR and Mumo Matemo –vs- Truced Society of Human Rights Alliance & 5 Others [2013] eKLR**, **Godfrey Paul Okutoyi & Others –vs- Habil Olaka & Another [2018]**

**eKLR, Benard Murage –vs- Fine Serve Africa & Others [2015] eKLR and Patrick Mbau Karanja –vs- Kenyatta University [2012] eKLR.**

45. The County Government of Meru further relies on the cases of **William Yator Kaino –vs- Masai Cheboi & 3 Others, Peter Muturi Njuguna –vs- Kenya Wildlife Service [2017] eKLR** to emphasis on the need to exhaust laid down procedures before resorting to court.

46. On the issue of public participation, the County Government of Meru insisted the 1<sup>st</sup> respondent acted in obedience to the consent dated 24.9.2012 to establish Mbwaa ‘A’ adjudication section.

47. Finally, the 1834<sup>th</sup> interested parties submitted that the consent order leading to the creation of Mbwa ‘A’ an adjudication section had never been set aside though the petitioners were out to circumvent its enforcement hence the adjudication of Mbwaa ‘A’ should be allowed to conclude within the confines of the law.

#### **E. ISSUES FOR DETERMINATION**

48. Having gone through the petition, witness statements, annexures thereto and the replying affidavits by both the respondents and the interested parties and the rival submissions the issues for determination are:

**1) If the petition raises any constitutional questions and or controversies.**

**2) If the 1<sup>st</sup> respondent violated the petitioners’ constitutional rights in creating and establishing Mbwaa ‘A’ adjudication section out of former Ruiru/Rwarera adjudication section.**

**3) If the petitioners have proved any violation of their Constitutional rights and freedoms as alleged and hence if entitled to the prayers sought.**

49. What constitutes a Constitutional petition and the threshold to be met has been determined and settled in a number of cases starting with **Anarita Karimi Njeru –vs- Republic [1997] KLR 154, Mumo Matemu –vs- Trustee Society of Human Rights Alliance [2014] eKLR.**

**50. The court held thus:-**

***“We cannot but emphasis the importance of precise claim in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims”.***

51. The jurisdiction of the court where it is alleged that a right or a fundamental freedom in the **Bill of Rights** has been denied, violated, infringed or threatened is to be found in **Article 165 (3) (b) of the Constitution.**

52. A party seeking for the enforcement of a bill of rights is required through the Constitution of Kenya **Protection of Rights and Fundamental Rights and Fundamental (Freedoms Practice and Procedure) Rules 2013** to file a petition. Under **Rule 10** the petition has to set out the facts relied upon, the constitutional provisions violated, the nature of injury caused or likely to be caused, details regarding any civil or criminal case related to the matters in issue and the reliefs sought.

53. The petitioners alleged the 1<sup>st</sup> respondent in 2013 arbitrarily, secretly, unprocedurally, illegally and in breach of rules of natural justice made an administrative decision declaring the area known as Mbwaa ‘A’ as an adjudication section falling outside the then Ruiru-Rwarera adjudication section where the petitioners were recorded as proprietors of the suit land.

54. It was averred the consequence of the said decision was that the petitioners’ parcels were shifted to the new adjudication section, which parcels were handed over to the people of Tigania and the petitioners being of Imenti subtribe of Ameru community, were deprived of their land, got illegally evicted and or displaced and have been living as internally displaced persons.

55. The petitioners aver there was no public participation, the hiving of the portion known as Mbwaa ‘A’ was secretly done; they were not informed of the decision; it was fraudulently done; they were not issued with new parcels numbers; other persons who forcefully evicted them were instead issued with parcel numbers and hence this amounted to breach of their constitutional rights as to ownership of land.

56. As a consequence the petitioners averred they stood to suffer irreparable loss, harm and damage due to the illegal and unlawful adjudication process being undertaken in Mbwaa ‘A’ adjudication section by the respondents.

57. The 1834 interested party, the County Government of Meru has submitted the petition has not met the threshold of a constitutional petition as set out in **Grays Jepkemoi Kiplagat –vs- Zakayo Chepkoga Cheruiyot [2021] eKLR.**

58. Whereas the petitioners are under the duty and obligation to be specific, certain and inform the court through the petition the manner, place, date and offer specific information and particulars on how their constitutional rights were, are and have been infringed, threatened and or likely to be infringed, threatened or breached, my finding is that the petition lacks clarity, specificity and was not pleaded with precision hence leaving a lot of necessary details to be filed in through witness statements, supporting affidavits and further affidavits.

59. The above notwithstanding, none of the respondents or the interested parties raised any issues that they were unable to respond to and or

answer to the allegations and or complaints raised in the petition.

60. In my considered view therefore, the respondent's and interested parties ably made responses to the petition notwithstanding the lack of precision and specificity.

61. In *Nation Media Group Ltd. –vs- Attorney General [2007] 1 E.A 261*, it was stated a constitutional court should be liberal in dispensing justice by looking at the substance rather than technicalities as to impede the cause of justice whereas in *Mumo Matemu (Supra)* the Court of Appeal held Kenya as a committed society to values of substantive justice, public participation by necessity and logic access to courts should be broadened. This being a land matter, and guided by the reasoning in *Nicholas Hendrick Claassen –vs- Commissioner for land & 4 Others [2016] eKLR, Ikiiya Omtatah Okoiti –vs- Kenya Power & Lighting Company Ltd & 10 Others [2018] eKLR*, I am of the view the court should sustain the petition rather than dismiss it on technicalities on account of form.

62. Turning to the substance of the petition, it is the petitioners' case that the 1<sup>st</sup> respondent set out the adjudication section without notice, in secrecy, with lack of public participation, in an illegal and unlawful manner and with the sole aim of denying them their constitutional rights as to land ownership in the area.

63. The 1<sup>st</sup> respondent denied the allegations and averred the Mbwa adjudication section was lawfully and legally established in line with the law and the consent order dated 24.9.2014.

64. Secondly it is the 1<sup>st</sup> respondent's case that the numbers the petitioners alluded to were nullified by the said consent and if at all they had any claim over land in Mbwa 'A' adjudication section just like any other residents of the area, the petitioners had all the rights and duties to participate in the process and have their rights and interests over their lands ascertained and nobody stopped and or denied them that opportunity.

#### **F. BURDEN OF PROOF**

65. It is trite law that he who alleges must prove. The respondents have pleaded there was a binding court order or decree as well as the **Land Adjudication Act Cap 284** which governed the issuance of the notice dated 14.3.2016 to establish the Mbwa adjudication section.

66. Given the defence of justification of law and a valid court order the onus was on the petitioners to set out with reasonable degree of precision how their constitutional rights and freedoms were infringed, violated and or threatened or likely to be threatened, infringed and or violated by the notification and subsequent statutory duties by the respondents.

67. Over and above that the petitioners had to discharge the burden of proof and establish before this court that the acts and omissions of the respondents resulted to and are likely to infringe, threaten and or breach their constitutional rights and freedoms as set out in the petition. **See *Githunguri Dairy Farmers Society Ltd –vs- Attorney General & 2 Others [2016] eKLR.***

68. The consent order from the Court of Appeal has not been set aside and or varied. The petitioners have not denied that the said consent exists. They have not denied either that it was binding on not only the respondents but also themselves. Again the petitioners have not stated that if aggrieved by the consent nullifying their earlier parcel numbers issued in former Ruiru/Rwarera adjudication section ever appealed or sought to set aside the said consent order. **See *Flora Wasike –vs- Destimo Wamboke [1988] 1 KAR 625.***

69. If at all the petitioners were aggrieved by the said consent one would have expected they would have gone back to the Court of Appeal to complain that the respondents had acted contrary to the consent and or that the consent implementation resulted into an unintended consequences.

70. In *Moharaj –vs- Attorney General of Trinidad of Tabogo [1979] AC 385* the court held no human rights and fundamental freedoms recognized by the constitution are contravened by a judgment or order that is wrong and or liable to be set aside on appeal for an error of facts or substantive law.

71. In *Trusted Society of Human Rights Alliance –vs- Attorney General & 2 Others [2013] eKLR* the court held:

***“..... The proper test under the new constitution is whether a petition as stated raises issues which are too unsubstantiated and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.”***

72. In *Leonard Otieno –vs- Airtel Kenya Ltd [2018] eKLR* the court stated decisions on violation of constitutional rights should not and must not be made in a factual vacuum, otherwise it would trivialize the constitution. Therefore to present a clear evidence in support of violation of a constitutional right is not a mere technicality but a prerequisite for a proper consideration of constitutional issues.

73. The petitioners' hypothesis was that the consent from the Court of Appeal under which the 1<sup>st</sup> respondent acted upon did not envisage and or intend their rights as to land ownership to be ignored and or given away to third parties in the new adjudication section.

74. The 1<sup>st</sup> respondent has stated that they followed the law and the consent order which had also nullified the initial parcel numbers given to the petitioners in former Ruiru/Rwarera adjudication section and which rights were to be taken care of in the new adjudication section.

75. In my considered view and looking at the consent, the court looked at the eventualities and doing the best it could in the circumstances gave a way forward for the existing Ruiru/Rwarera adjudication section and the incoming new adjudication section.

76. The discretion to name, establish, gazette and carry out the adjudication process was left with the 1<sup>st</sup> respondent. It could not have been the intention of the court to indefinitely superintend the process and or control it over and above what the enabling law – the **Land Adjudication Act** allowed the role of courts to be during an adjudication process.

77. Similarly it could not have been the intention of the Court of Appeal and the parties to the consent to deny any party rights as at the time and or give an undue advantage to parties or future beneficiaries to the suit land more rights or interests of the suit land in the area than they were entitled to under any land registration legal regime. See **Article 24 (1)** of the **Constitution**.

78. In other words therefore the process of land adjudication had to continue within the law. On the same reasoning it could not have been the intention of the Court of Appeal in issuing the consent order and directives that the role and the duties of persons and residents beneficiarilly entitled to land rights and interests in the area to be replaced and or displaced from their parcels of land including the petitioners herein.

79. As persons affected by the consent order and the new developments, the petitioners were expected to have been individually responsible citizens. **Article 61 (1)** of the **Constitution** states all land in Kenya belongs to the people in Kenya collectively as a nation, communities and as individuals.

80. **Article 63 (3)** vests unregistered community land in the 1834 interested party in trust for the locals of the County. So it cannot be true for the petitioners to plead the role of the County Government of Meru in the signing of the consent order and the eventual roll out of the adjudication process to have been unconstitutional.

81. Once the consent order was signed and made public and the stage set for the roll out the petitioners were expected to actively participate in the adjudication process and play their role as required under **Section 13 of Cap 284**. The petitioners alleged at paragraph 5 of the petition the decision to establish Mbwa adjudication section was arbitrary, secretly, unprocedurally, unlawful and irregularly made in 2013. That is further from the truth given the contents of the consent order and the notification dated 13.2.2016.

82. The petitioners have not demonstrated how the notification was irregular, unprocedural and unreasonable and contrary to the provisions of **Sections 5, 6 and 20** of the **Land Adjudication Act**.

83. The petitioners alleged the respondents by creating Mbwa adjudication section wanted to deny them their constitutional rights as to ownership of land in the area. **Section 3** of the **Land Adjudication Act** provide the Minister may by order apply this Act to any area of community land if the County Government in whom the area is vested so request and if the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered. The people of Mbwa 'A' adjudication section fall under this discretion.

84. Once the notice was published, every person who had an interest in land in the adjudication section concerned was to make a claimant to the recording officer. The recording officer has powers to consider and determine all claims presented to him. Where there is more than one claim to a parcel of land and the recording officer is unable to determine the same, he refers the same to the adjudication committee for determination. If the adjudication committee cannot resolve the dispute, it is supposed to refer the same to the arbitration board.

85. **Section 48** of the Interpretation and **General Provisions Act** provides as follows:-

***“Where a written law confers powers upon a person to do or to enforce the doing of any act or thing, all powers shall be deemed to be conferred as are necessary to enable that person to do or enforce the doing of that Act”.***

86. In my view the power to issue a notification under **Section 5** of the **Land Adjudication Act** was bestowed upon the 1<sup>st</sup> respondent. The notice defined the areas, the boundaries, the purpose, timeframe and the limits of rights as to access to court and or over the pre-existing civil claims.

87. The petitioners did not attack the contents and the timeframes of the notice. Instead they termed the notice illegal, unreasonable, unprocedural and falling short of public participation.

88. The 1<sup>st</sup> respondent had powers under the law to publish the notice and gave the requisite details as appropriately as possible. There is no indication from the petitioners that the 1<sup>st</sup> respondent acted ultra vires and or abused or misused his powers in issuing the notice. The 1<sup>st</sup> respondent had both express and implied powers and incidental powers to issue the notice and proceed to undertake the exercise as explained in the notice and in line with the law.

89. As regards the issue that the 1<sup>st</sup> respondent's notice was intended to disentitle a certain group, persons and or individuals from enjoying their land rights, the notice was clear that any person claiming any such right in the area was to present his or her claim to the recording officer either in person or by a duly authorized agent not later than 2.2.2016.

90. It cannot therefore be said the 1<sup>st</sup> respondent was targeting a specific group of persons and or was aiming to block and or neglect a certain group of persons, the petitioners or interested parties included and or vice versa. There was no claim or averment on bias or discrimination at all in the petition and no prove thereof has been made hence I reject that line of submissions that the notice was intended to deny the petitioners ascertainment of their interests and rights over the land as a subtribe in favour of another subtribe.

91. Coming to the issue on whether the petitioners knew or became aware of the notice and if so when it came to their knowledge on the existence of the notice, the petitioners as stated above have not given particulars of any such alleged breach in the petition.

92. Needless to say the petition was filed in court on 28.6.2016 whereas the notice by the 1<sup>st</sup> respondent is dated 13.2.2016. This was four months and 13 days after the notice was published.

93. There is no indication in the petition, regardless of whatever time the petitioner's became aware of the notice and more importantly since the adjudication process was ongoing, if at all the petitioners individually and or collectively visited the offices of the 1<sup>st</sup> respondent, made inquiries and or were notified the status of the process and perhaps formally lodged whatever claims they had over their interests and rights over land in the adjudication section.

94. Assuming the petitioners were holding the old recorded numbers for Ruiru Rwarera adjudication section again it is not clear if they ever brought to the attention of the 1<sup>st</sup> respondent the existence of those numbers for his consideration one way or the other.

95. More importantly also, the petitioners allege that they had been evicted, developments on their lands demolished by the invaders and forcible eviction occasioned to them. None of the petitioners has attached photographs or OB reports and or documented reports over the said illegal activities by the invaders. Similarly there is no evidence the persons who forcefully evicted them were ever reported to the relevant government offices and investigations commenced to that effect or perhaps action taken against them.

96. In my considered view a party approaching the court vide a petition over land subject to adjudication process that is recognized by law must do more than make mere allegations against a mechanism duly sanctioned and vested with statutory powers, duties, obligations and internal dispute resolution mechanisms.

97. There is no evidence that the petitioners subjected themselves to the adjudication process and if for one reason or the other they were unable to be assisted. The onus was on the petitioners to plead and prove why between 10.10.2014 and 28.6.2016 they were not able to participate in the process leading to the creation of Mbwaa adjudication section yet they claim to have been temporarily evicted by strangers from the area.

98. The petitioners have also attacked the adjudication process as being fraudulent. Fraud, illegality and mistake must not only be specifically pleaded but must also be specifically proved as held in *Morjaria –vs- Nansingh Madhusingh Darbar & another [2000]eKLR*. No such particulars were given in the petition and or proved with documentary evidence above a balance of probability.

99. Turning to the issue whether the petitioners constitutional rights under **Article 40** have been infringed, the ascertainment and determination of rights and interest in land within an area is reserved by law for the officers and quasi-bodies set up under **Cap 284**. This was the holding in *Tobias Achola Osindi & 13 Others –vs- Cyprian Otieno Ogalo & 6 Others [2013] eKLR*.

100. In *Mary Jemutai Tonje –vs- Raphael Chebii & 5 others [2018] eKLR* the court held setting out facts and proving those facts is a burden that falls squarely upon the shoulder of a petitioner. The parcel numbers of land in which the petitioners claim, were nullified by the Court of Appeal and subjected to re-adjudication through re-declaration of a new adjudication section. The petitioners now claim their fundamental rights and freedoms to own land and to protection of fair administrative action have been grossly violated.

101. The right to own land is protected under **Article 40 of the Constitution**. There is no evidence availed that the petitioners have had their rights and interests ascertained under **Sections 13, 15, 20, 21, 22, 23, 24 and 26** of the **Land Adjudication Act** on the path towards attaining the status of a right to ownership of property to be protectable under **Article 40 of the Constitution**.

102. There is evidence by the respondents that the adjudication train left the station without the petitioners being on board. The petitioners have not denied that fact and neither have they demonstrated any efforts towards catching up with the train at whatever stage it has reached. They have produced no tickets in line with the first port of call under **Section 13 of the Land Adjudication Act**.

103. That notwithstanding the petitioners urged this court to be treated as passengers who can enjoy complete and exclusive interests of passengers even when they are not on board the adjudication train. The first step is to make a claim to the recording officer and point out the boundaries. A party who fails to do so must face the consequences as set out under **Section 13 (3) of the Land Adjudication Act**.

104. In my considered view the petitioners must first subject themselves to the land adjudication process so as to claim any violation of rights under **Article 40 laws** are made to be followed. A party cannot claim land rights in vacuum.

105. In the absence of the evidence that the notice given by the 1<sup>st</sup> respondent was both unconstitutional and illegal and the subsequent adjudication process was and is devoid of legality and constitutionality, my finding is the petitioners have failed to discharge the burden of proof under **Section 107 and 109 of the Evidence Act**.

106. As regards the prayers and requests by the 1<sup>st</sup> – 1833<sup>rd</sup> interested parties, they did not lodge any cross petition, plead any claims and make any specific prayers. Further the petition is made against the respondents. The 1<sup>st</sup> – 1833<sup>rd</sup> interested parties cannot arrogate themselves the constitutional and statutory responsibilities bestowed in law upon the respondents. Similarly the interested parties cannot assume the excesses or weaknesses by the respondent's.

107. The 1<sup>st</sup> to 1833<sup>rd</sup> interested parties attempted to introduce a demarcation register allegedly issued by the 1<sup>st</sup> respondent which is neither certified nor verified. The respondents did not give an accurate status of the land adjudications process and the manner in which the process has been ongoing from 10.10.2014 and up to the filing of the petition. That notwithstanding the burden of proof does shift to the respondents to prove compliance with the Constitution and statutes.

108. In the premises the court finds petition raises no Constitutional questions but issues relating to a statute. The respondents in complying

with the statute did not violate any of the petitioners' constitutional rights and freedoms as alleged. The petitioners have been unable to prove any such breach, violation of the alleged constitutional rights and freedoms. Similarly the petitioners have been unable to prove any injury, loss or damage out of the actions by the respondents in undertaking their statutory duties.

109. The petition is dismissed with no order as to costs.

110. Any existing orders are hereby lifted.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19<sup>TH</sup> DAY OF JANUARY, 2022**

**In presence of:**

Muriuki for petitioners

Kieti for respondents

Thuranira for 1<sup>st</sup> interested party

Mwirigi for 1834 interested parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**